

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHANNA HIRLINGER,

Petitioner.

vs.

SAMUEL L. BOYD, as Trustee in Bankruptcy of
THE LANE LUMBER COMPANY, LIMITED,
a Corporation, Bankrupt,

Respondent

In the Matter of THE LANE LUMBER COMPANY,
LIMITED, a Corporation, Bankrupt.

On Petition for Revision from the United States
District Court for the District of Idaho,
Northern Division.

Brief of Petitioner, Johanna Hirlinger, on Revision.

FRANK LANGLEY,
Coeur d'Alene, Idaho,
Attorney for Petitioner.

Filed this day of February, 1914.

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JOHANNA HIRLINGER,

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ED, a Corporation, Involuntary Bankrupt,
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STATEMENT OF THE CASE.

The Petition of Johanna Hirlinger for review and revision in this case shows the following facts:

That on June 1, 1908, Johanna Hirlinger, petitioner, sold and conveyed certain lands to the Lane Lumber Company for the price of \$1,333.66, no part of which price has ever been paid, and the payment of which is unsecured otherwise than by the personal obligation of the buyer; that the Lane Lumber Company was adjudged an involuntary bankrupt on July

29, 1911; on September 7, 1911, through ignorance, inadvertance and mistake, and without knowledge of the law, Johanna Hirlinger filed her claim against the bankrupt, for said price, which was thereafter allowed as an unsecured debt on May 10, 1912; on September 2, 1913, Johanna Hirlinger filed a petition (Record pp. 10 to 16) asking leave to withdraw her proof of unsecured debt, and to substitute therefor a proof of secured debt claiming a vendor's lien upon said lands for such unpaid price; the trustee filed objections (Record pp. 16 to 18) to said petition, claiming: "That a vendor's lien can not be asserted against the title of the trustee; that the trustee had paid taxes upon the lands; and that the lien had been lost through laches in asserting it;" the Referee entered an order (Record pp. 18 to 20) overruling said objections and granting said petition for leave to substitute; from this order of the Referee the Trustee petitioned for a Review (Record pp. 19 to 23) by the District Court, claiming that the Referee erred in making said order, upon the several grounds mentioned in said objections.

This Review was heard before the Honorable Frank S. Dietrich, District Judge, who, on December 2, 1913, filed his Memorandum Decision (Record pp. 26 to 29) reversing said Order of the Referee, upon the grounds: (a) "That Johanna Hirlinger, as an un-

secured creditor, has had the right to participate in the administration of the estate, and to vote as such unsecured creditor;" (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company;" (c) "presumably taxes have been paid upon the land by the trustee."

Later, on December 23, 1913, the District Judge filed his Findings of Fact (Record pp. 28 to 31) and formal Judgment (Record pp. 31 to 33) making effective said Memorandum Decision.

And on December 23, 1913, Johanna Hirlinger filed a petition in the District Court for a Rehearing (Record pp. 32 to 37) on said Order of the Referee, which petition was denied by an order entered on the minutes of the Court (Record pp. 37) on December 26, 1913.

From the foregoing Decision, and Judgment, and Order denying Petition for Rehearing, Johanna Hirlinger has petitioned this Honorable Court for Review and Revision.

ASSIGNMENTS OF ERROR.

Petitioner assigns error (Record pp. 3, 4, and 5) in said Memorandum Decision and in said Judgment as follows:

1. Because said memorandum decision, and said judgment, and each of them, are not supported by

the Findings of Fact, in this, to-wit: Such decision and such judgment, and each of them, are based upon the presumed findings: (a) "In the meantime claimants, as unsecured creditors, have had the right to participate in the administration of the estate and to vote as such unsecured creditors;" (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company;" (c) "presumably taxes have been paid upon the lands by the trustee". And such presumed findings, namely, "(a)" and "(b)," are not contained in said Findings of Fact, and are not based upon issues raised by the trustee's assignments of error in his said Petition for Review, nor by the assignments of error in the trustee's said Objections, and should not have been considered by the District Judge in passing upon said Petition for Review.

2. Because the mere fact of Johanna Hirlinger having had the right, as an unsecured creditor, to participate in the administration of the estate, and to vote as such unsecured creditor, is not, in itself, sufficient to estop her from filing a substituted proof of secured debt as prayed in her said Petition therefor.

3. Because the payment by the trustee, of a trust deed covering these together with other lands,

and securing a large issue of bonds of the bankrupt company, is not, in itself, sufficient to estop claimant from filing such a substituted proof of secured debt, nor is such a finding supported by said Findings of Fact.

4. Because said Memorandum Decision and said Judgment, and each of them, are not supported by said Findings of Fact, nor are they supported by or based upon the issues raised by the trustee's said Objections, nor by the issues raised by the assignments of error in the trustee's said Petition for Review.

5. Because the mere payment of taxes by the trustee, in itself, is not sufficient to estop petitioner from being granted the relief prayed for in said petition for leave to file substituted proof of secured debt.

Petitioner, by reference to the five foregoing alleged errors, assigns the same, and each of them, as errors in said Order of the District Judge denying said Petition for Rehearing; and further assigns, as additional error in said Order of the District Judge, as follows:

6. Because said Order of the District Judge denying said Petition for Rehearing prevents your petitioner from doing equity and from receiving equity, that is to say: Such Order refuses to accept petitioner's offer to pay to the bankrupt estate and the

trustee all moneys, with legal interest thereon, expended by the trustee on account of taxes on the lands involved, during the administration of said estate.

ARGUMENT.

The facts in this case are not in dispute, and the only questions involved are questions of law. The action of the District Court is complained of for two reasons, namely: (1) In denying the petition for leave to file substituted proof of secured debt asserting a vendor's lien, and (2) in denying the Petition for Rehearing.

It must be held that, under the facts as found and conceded in this case, the right to a lien for the unpaid purchase price existed at the time of the commencement of the proceedings in bankruptcy. Such a right is established by Section 3441 of the Idaho Revised Codes, reading:

"One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer".

In passing upon lien claims based upon State laws, Bankruptcy Courts follow the law of the State where the land in controversy is situated.

Chilton vs Lyons, 67 U. S. 458; 17 L. Ed. 304.

Slide etc. Gold Mng. Co. vs. Seymour, 153 U. S. 509; 38 L. Ed. 802.

Studevaut Bank vs. Schade, 195 Fed. 188.

Bankruptcy Act of 1898, as amended, Section 67 (d).

Section 67 (d) of the Bankruptcy Act reads:

“Liens given or accepted in good faith and not in contemplation of or in fraud upon the Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall, to the extent of such present consideration only, not be affected by this Act.”

It is not contended by the trustee that this lien was not given and accepted in good faith and for a present, valuable consideration, nor that the State law required the same to be recorded.

Prior to the Amendment of 1910 the trustee had not authority to attack claims based upon unrecorded liens and mortgages where the State law required such to be recorded, nor did he then possess certain other powers now his under the Act as amended.

Remington on Bankruptcy, Secs. 1207½ to 1210.

In re Economical Printing Company, 110 Fed. 514.

But section 47a of the Act, as amended in 1910, conferred upon trustees, "as to all property in the custody or coming into the custody of the bankruptcy court, all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." The purpose of the amendment relates not to the validity of liens established and recognized under the State laws, but only to the trustee's right to question claims that are defective or invalid under such laws. Section 70 of the Act fixes the the trustee's title.

In re Morris, 204 Fed. 770.

Big Four Implement Co. vs. Wright, 207 Fed. 535.

In re Stern, 208 Fed. 488.

Memorandum Decision of Judge Dietrich, case No. 2363 now pending before this court.

The rule still remains, as before, that liens created by authority of, and in compliance with, the Statutes of a State will be recognized and sustained in bankruptcy proceedings.

Sec. 67 (d) of the Bankruptcy Act.

Loveland on Bankruptcy (4th Ed), Section 372.

In re U. S. Lumber Co., 206 Fed. 236.

Unless waived or lost by laches, the right to file a substituted proof of lien claim should be recognized. In this case the original proof of claim (Record p. 8)

discloses the fact that the debt claimed represents the unpaid purchase price of the lands involved. But through ignorance, inadvertance and mistake, the claim was first filed as an unsecured debt (Par. IV., Findings of Fact, Record p. 29). There was, therefore, no waiver of lien.

Remington on Bankruptcy, section 766.

Loveland on Bankruptcy (4th Ed), sec. 345.

Collier on Bankruptcy (7th Ed), page 598.

In re Hubbard, No. 6813 Federal Cases.

In re Swift, 111 Fed 503.

In Idaho the vendor's lien can be lost, through laches, only where the property has passed into the hands of a purchaser or incumbrancer in good faith and for value; and the trustee is not such a person.

Section 3443 of the Idaho Revised Codes reads:

“The liens of vendors and purchasers of real property are valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value.”

Even though the Statutes of Idaho required vendor's liens to be placed of record, which is neither required nor provided for, the trustee's rights are inferior to the lien claimant's, because the trustee is armed only with the “rights etc. of a creditor holding a lien by legal or equitable proceedings;” and such

a creditor is not a "purchaser or incumbrancer in good faith and for value."

Dawson vs. McCarthy, 57 Pac. 816.

And, even though section 3443, Idaho Rev. Codes, supra, did not establish and limit, exclusively, the sole manner in which the vendor's lien can be lost, the defense of laches could not be maintained in this case, because, as said by this Court in the case of London & San Francisco Bank vs. Dexter Horton & Co., 126 Fed. 593, supported by authorities therein cited on page 601:

"One principle pervades all cases involving the defense of laches, however, and that is, that not only must there be a seemingly unnecessary delay on the part of the plaintiff in bringing or prosecuting his action, but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it would be inequitable to permit the claims of plaintiff to be enforced."

Slide etc. Gold Mng. Co. vs. Seymour, 153 U. S.;
38 L. Ed. 802.

Felix vs. Patrick, 145 U. S. 317; 36 L. Ed. 719.
Bartlett vs. Ambrose, 78 Fed. 839.

Obert vs. Obert, 12 N. J. Eq. 423.

And, wherein has the delay in asserting the vendor's lien caused any prejudice to the trustee? Or, what

change in the condition or relations of the property or parties has occurred which would now make it inequitable to permit the assertion of the lien?

The Findings of Fact (Record pp. 28 to 31) fail to disclose, neither can it be successfully asserted, that Johanna Hirlinger, if now permitted to assert her lien, would have gained any advantage by reason of her delay, or that any creditor would suffer loss by reason of the claim having been first filed, through ignorance, inadvertance and mistake, and without knowledge of the law, and allowed as unsecured. And, where no one has been caused to change his position by reason of the filing of proof of unsecured debt, the same may be withdrawn and proof of secured debt substituted.

Remington on Banruptcy, section 766.

In re Friedman, 1 A. B. R. 510.

In re Wilder, 101 Fed. 104.

In re Strickland, 167 Fed. 867.

Hutchinson vs Otis, Wilcox & Co., 190 U. S. 552;
47 L. Ed. 1179.

The decision and the Judgment of the District Court (Record pp. 26 to 29, and pp. 31 to 33, respectively), are based upon the following grounds: (a) "In the meantime claimants, as unsecured creditors, have had the right to participate in the administration of the estate and to vote as such unsecured cred-

itors;" (b) "he (the trustee) has also paid in full a trust deed covering these together with other lands, and securing a large issue of bonds of the bankrupt company;" (c) "presumably taxes have been paid upon the lands by the trustee." Johanna Hirlinger complains that the first two grounds stated, namely, (a) and (b), are not contained in the issues raised by the trustee's objections (Record pp. 16 to 18); nor in the issues raised by the trustee's assignment of errors in his petition for Review (Record pp 19 to 23), and were not before the court for consideration, and should not have been considered by the Court. The Memorandum Decision and the Judgment are each fatally defective because they are not based upon the pleadings.

Crocket vs. Lee, 7 Wheat. 522; 5 L. Ed. 513.

Carneal vs. Banks, 23 U. S. (10 Wheat); 6 L. Ed. 297.

Reynolds vs. Stockton 3 Am. St. Rep. 305.

Jones vs. Davenport, 17 Atl. 570.

And in the case of Backman vs. Sepulveda, 39 Cal. 688, the court said:

"A judgment that is not supported by the pleadings is as fatally defective as one which is not sustained by the verdict or findings. The judgment must accord with, and be warranted by, the pleadings of the party in whose favor it is

rendered."

The right to participate in the election of a trustee and in the administration of the bankrupt estate, or even such actual participation and the receipt of dividends, as an unsecured creditor, if no creditor has been caused to change his position, is no objection to the filing of a substituted proof of secured debt.

Loveland on Bankruptcy (4th Ed), section 346.

In re McConnell, No. 8712 Federal Cases.

In re Parkes, No. 10754 Federal Cases.

Nor does the mere payment of taxes on the lands involved, by the trustee, make him a "purchaser or incumbrancer in good faith and for value" in contemplation of section 3443, Idaho Rev. Codes, *supra*. If the payment of taxes should be held sufficient to defeat the vendor's lien, the very purpose of the vendor's lien Statute of the State would be avoided, because every purchaser of lands is presumed to pay the taxes as they fall due. In this case there is no finding as to the amount of taxes paid by the trustee, and, unless it affirmatively appears from the record that the estate will be substantially injured by the delay in asserting the vendor's lien, the same should be permitted to be filed; and it nowhere so affirmatively appears. Such payment of taxes might entitle the trustee to an equitable lien on the lands involved, for

the taxes paid; but such a condition would not make it inequitable to allow the vendor's lien subject to the trustee's lien for taxes paid, if the amount so paid had been proven by the trustee.

London & San Francisco Bank vs. Dexter Horton & Co., 126 Fed. 593, at page 607 (C. C. A., 9th Circuit, *supra*).

Courts of equity look upon vendor's liens as creatures of the highest equity. In *Baum vs. Grigsby*, 21 Cal. 172, 176, the Court says:

"It (the lien) does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property which he has transferred to satisfy the debt which constitutes the consideration of the transfer."

In *Redfeld vs. Woodfolk*, 63 U. S. 22 How. 318; 16 L. Ed. 370, the Court says: "A court of Chancery regards the transfer of real property in a contract of sale and the payment of the price as correlative obligations. The one is the consideration of the other; and the one failing leaves the other without a cause."

The order of the District Judge denying the Petition for Rehearing (Record p. 37) is erroneous for the several reasons hereinbefore urged against the validity of said Decision and said Judgment; and for

the further reason: That, at the time of the rendition of such Decision, petitioner had never been advised of the amount of taxes paid by the trustee, and in such Petition for Rehearing (Record p. 34) the offer is made to reimburse the trustee for all taxes paid on the lands involved, with interest. The trustee can not now say that the estate, after having been reimbursed for all taxes paid, will in any way be prejudiced by the delay in asserting the lien claim. And it was not necessary for the claimant to make such an offer, for the vendor's lien might properly be allowed subject to the trustee's equitable lien for taxes paid. Bankruptcy proceedings are continuous proceedings; there are no terms in Bankruptcy Courts.

Bankruptcy Act of 1898, as amended, section 2.

Sandusky vs. National Bank, 90 U. S. 289; 23 L. Ed. 155.

In view of the vendor's lien Statutes of Idaho, *supra*, and of Section 67(d) of the Act, and of the equitable nature of proceedings in bankruptcy, and of the relief asked, I respectfully submit that the memorandum decision, the judgment, and the order of the Honorable District Judge and each of them, are erroneous, and should be reversed; and, that a decree should be entered herein granting to Johanna Hirlinger the right to withdraw her proof of unsecured debt

and to file and substitute therefor a proof of secured debt based upon her claim of vendor's lien as aforesaid.

Respectfully submitted,
FRANK LANGLEY,
Attorney for Petitioner,
Coeur d'Alene Idaho.

Service of the foregoing Brief of Johanna Hirlinger, petitioner, is hereby accepted, by the receipt of a copy thereof, this 28th day of Jan.
..... A. D., 1914.

E. M. Levine

Attorney for Trustee.

Copy.